

No. _____

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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

RICHARD P. CHRISTY, THOMAS B. GUTHRIE
and IRA PERKINS,

Petitioners,

VS. ▽

DONALD P. HODEL, Secretary of the Interior
and
THE UNITED STATES DEPARTMENT OF INTERIOR

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

I. Is the protection of one's property from imminent destruction by federally protected wildlife encompassed among the rights guaranteed by the Constitution of the United States of America?

II. If such right is encompassed among those guaranteed by the Constitution, what is the appropriate level of review to be used in determining whether governmental proscription on its exercise meets Constitutional requirements?

III. If such right is encompassed among those guaranteed by the Constitution, can the complete proscription of its exercise as contained in the Endangered Species Act and regulations promulgated thereunder satisfy the appropriate level of review?

IV. Does the absolute prohibition of the right to protect one's property from imminent destruction contained the Endangered Species Act and regulations, and the subsequent failure to compensate for the losses sustained therefrom constitute a taking in violation of the Fifth Amendment to the Constitution of the United States?

V. Does the federal government's selection of a species of wildlife for protection and its proscription on the killing of such wildlife even in the immediate protection of one's property render such species an agent of the government for purposes of determining whether destruction of private property by such wildlife constitutes governmental taking for Fifth Amendment purposes?

VI. Does governmental relocation of protected wildlife render such wildlife an agent of the government for purposes of determining whether any subsequent destruction of private property by such wildlife constitutes governmental taking for Fifth Amendment purposes?

VII. Did the Ninth Circuit err in upholding summary judgment based on the absence of any genuine issues of material fact when Petitioners had been precluded by order of the District Court from conducting any discovery to obtain such material facts?

LIST OF PARTIES

The parties named in the caption of this Petition are the same as those named in the proceedings below.

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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 1324 and is reprinted in the Appendix at p.6a. The memorandum and order of the United States District Court for the District of Montana (Hatfield, D.J.) was not reported. It is reprinted in the Appendix at p.2a.

JURISDICTION

Petitioners brought this action in the District of Montana, invoking federal court jurisdiction under 16 U.S.C. §1540; 28 U.S.C. §1346(a)(2); 28 U.S.C. §1331; and 5 U.S.C. §702. On May 4, 1987, the United States District Court, Montana District granted Respondents' Motion for Summary Judgment and entered judgment thereon. [p.1a]

Petitioners appealed to the Ninth Circuit and on September 21, 1988, the Ninth Circuit affirmed the Order of the District of Montana and entered Judgment. Petitioners timely filed a Petition for Rehearing, which Petition was denied by the Ninth Circuit on November 3, 1988. [p.33a]

On January 9, 1989, Petitioners filed an Application for Extension of Time in which to file this Petition up to and including March 3, 1989, on the ground that one of the counsel for Petitioners had been injured. By Order of this Court dated January 12, 1989, this extension was granted.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process and just compensation clauses of the Fifth Amendment to the United States Constitution, the provisions of which are printed at p. 56a.ⁱ

The following sections of the Endangered Species Act, the pertinent provisions of which are printed at p.57a - p.59a:

- 16 U.S.C. §1531(a) and (b)
- 16 U.S.C. §1532(6), (19) and (20)
- 16 U.S.C. §1533(d)
- 16 U.S.C. §1538(a)(1)(B)

50 C.F.R. §17.40(b), the pertinent provisions of which are printed at p.60a.

1. The Fourteenth Amendment to the United States Constitution applies by its own terms only to state and local governments. There is no equal protection clause that governs the actions of the federal government, such as those under consideration in this case. The cases have held however that if the federal government classifies individuals in a way which would violate the equal protection clause of the Fourteenth Amendment, it will be held to contravene the due process clause of the Fifth Amendment. These standards for validity under the due process and equal protection clauses are identical. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

STATEMENT OF CASE

Petitioners, all woolgrowers, filed the action below after each had sustained significant sheep losses from depredating grizzly bears, an animal listed as "threatened" under the Endangered Species Act, 16 U.S.C. §1531 et seq. ("Act"). Petitioners share the common experience of having vainly sought assistance from the Department of the Interior ("Department") to avoid these losses and having been told they could not kill the grizzly bears even in the immediate protection of their flocks.

The stark reality of this statutory proscription against the defense of one's property was graphically demonstrated for Petitioner Christy on the evening of July 9, 1982, when he made an emergency visit to his flock after being informed that for six days two grizzlies and two black bears had been killing his sheep. [Transcript of Administrative Hearing of August 13, 1984, contained in the "Administrative Record for the Assessment of Civil Penalty Against Richard P. Christy", [CR 10] ("Tr."), p.55, 1.10-21]. Christy had first learned of the depredating bears about a week earlier and as a result sought the assistance of the United States Fish & Wildlife Service's Animal Damage Control Unit ("Unit"). Efforts by the Unit to trap the offending bears had been a total failure. As of July 9, 1982, Christy had lost some 27 sheep to the bears.

While Christy was present with his flock on July 9, 1982, Christy witnessed an impending attack on his flock by two grizzlies. In response, Christy shot and killed one of them. Ultimately he removed his flock from that area having lost 84 sheep.

Pursuant to the Act, the Department assessed a \$3,000 civil penalty against Christy for killing the grizzly. An administrative hearing resulted in a reduction of his fine to \$2,500.

Petitioners Perkins and Guthrie had pastured sheep for many years. Both lost sheep to grizzly bears in 1984 and 1985. In 1985 alone, grizzlies killed approximately 30 of Guthrie's sheep, worth some \$2,200. [Cm., para.8.0] Both had contacted federal authorities only to be told the authorities would try to prevent future losses, but in no event could Guthrie or Perkins kill the grizzlies even in the immediate defense of their sheep.

Both continued losing sheep and Guthrie finally ceased raising sheep. [Cm., para.8.2] These experiences mirror those of many other Montana stockgrowers.

Pursuant to the Act, the Secretary of the Interior ("Secretary") is authorized to promulgate lists of species which are endangered and threatened. [16 U.S.C. §1533(a)(1); §1532(6) and (20) p.58a] The Act specifically defines prohibited actions as to endangered species and authorizes the Secretary to regulate prohibited actions as to threatened species. The Act prohibits the "taking" of endangered species which is defined in pertinent part to include the killing of a protected species. 16 U.S.C. §1532(19)

The Secretary has listed grizzly bears (*ursus arctos horribilis*) as a threatened species. The pertinent regulations found at 50 C.F.R. §17.40(b) at seq. proscribe the "taking" of grizzly bears, except under the following, limited circumstances:

- (1) By anyone in self-defense or defense of others.
- (2) By authorized state or federal employees only if the grizzly bear has committed significant depredations to livestock and it has not been reasonably possible to eliminate the threat through live capture.

In addition the regulations provide that up to 25 grizzly bears can be hunted and killed for sport each year in a designated geographic area of Montana, unless 25 grizzly bears were already killed that year in that same geographical area for whatever reason.² The regulations explicitly recognize the distinct possibility of grizzly bears' committing "significant depredations" to livestock. Neither they nor the Act makes any provision for compensating livestock owners for their losses.

Petitioners' Complaint in the United States District Court sought declaratory and injunctive relief alleging the existence of a Constitutional right to protect their property and a deprivation of that right by the Act and regulations in deroga-

2. At all times pertinent, Petitioners' flocks were all pastured within this geographic area.

tion of due process and equal protection guarantees. Petitioners also alleged that the Act and regulations effected a taking of their property without just compensation and due process of law.

Per Order of the United States District Court entered at a scheduling conference, no discovery was conducted by either party.³ Respondents then filed a Motion for Summary Judgment, arguing that there is no fundamental right under the Constitution to protect one's property and that the Act and regulations therefore need only be rationally related to the preservation of grizzly bears. Respondents alleged that the Act satisfied this test and that the Act did not constitute a taking for which compensation was due. The District Court granted the Motion for Summary Judgment, adopting the Respondents' arguments.

Petitioners appealed to the Ninth Circuit, once again asserting the existence of Constitutional rights and protections, and that genuine issues of material fact existed as to whether the Act and regulations could satisfy Constitutional due process or equal protection guarantees.

In support of their due process argument, Petitioners described the following situations which occur with frequency due to the provisions of the Act and regulations:

Livestock owners suffering from escalating losses from depredating grizzly bears must stand by while grizzly bears destroy their stock and after the losses are tallied, they are not even compensated. This occurs even after the stockgrower has fully cooperated with governmental authorities who have unsuccessfully attempted to trap the species.

3. The Court's ruling was based upon the Respondents' assertion at the time of the scheduling conference that their forthcoming motion for summary judgment could be decided solely by application of the law to the facts contained in the administrative record. As it turned out however, and as reflected in the Opinion of the Ninth Circuit, Petitioners were faulted for not raising facts outside the administrative record to defeat Respondents' Motion, even though the District Court's ruling and its effects in precluding Petitioners from submitting any evidence outside the record had been explained to the Ninth Circuit.

Since public reaction to this arbitrary denial of rights and resulting injustice would ultimately defeat the goals of the Act (protection of the grizzly), Petitioners argued the Act and regulations failed even the rational basis test.

Petitioners' equal protection arguments were based on their assertion the Act and regulations created two classifications and that genuine issues of material fact existed as to whether either of these classifications bore even a rational relationship to the purposes of the Act. The two classifications are as follows:

- (1) Hunters can kill grizzly bears for sport each year; this same authority is withheld from livestock owners even in immediate defense of their stock.
- (2) Stockgrowers near grizzly habitat are required to sacrifice their livestock in unlimited numbers to depredating grizzlies; the remaining citizens share in benefits of the Act but do not incur even the slightest financial loss.

The basis of Petitioners' Fifth Amendment taking claim was that governmental actions taken pursuant to the Act and regulations combined to result in a total physical destruction of Petitioners' livestock without any form of compensation. Relying on *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), Petitioners argued that in violation of the Fifth Amendment, they are being called upon to shoulder burdens which should be borne by the public as a whole.

The Ninth Circuit declined to recognize the right to defend one's property from protected wildlife as a fundamental constitutional right and found that the Act and regulations rationally furthered a legitimate governmental objective. [p.18a] Petitioners' equal protection arguments were also rejected. The Ninth Circuit found the regulations created the following classification which was rationally related to the objectives of the Act: those who can hunt and kill grizzly bears for sport and livestock owners who cannot kill grizzly bears under any circumstances, even in immediate defense of their stock. [p.22a] Finally, the Ninth Circuit agreed grizzlies had

physically taken Petitioners' property, but found that the conduct of the grizzly bears was not attributable to the government. On that basis, it concluded there was no taking by the government which would trigger application of the Fifth Amendment just compensation clause. The Ninth Circuit dispensed with Petitioners' public benefit argument by its conclusion the Act and regulations do not "force" Petitioners to shoulder any burden. The Court said: "The losses by Plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in public interest." [p.29a]

On numerous occasions in its opinion, the Ninth Circuit referred to the fact Petitioners had not proffered any evidence concerning certain issues. For example, the Court said:

Plaintiffs submitted no evidence, by affidavit or otherwise, in opposition to the Defendants' motion. [p.14a]

When a Defendant's motion shows that there are no genuine issues of material fact, a Plaintiff's unsupported assertion to the contrary is insufficient to forestall summary judgment. [p.14a]

These observations appeared to influence the Ninth Circuit's ultimate decision that there was an absence of genuine issues of material fact. In fact, however, as explained at page 6, supra, Petitioners had been precluded from undertaking discovery and presenting any evidence in opposition to Respondents' summary judgment motion. Petitioners unsuccessfully raised this issue in their Petition for Rehearing.

On November 7, 1988, Petitioners moved the Ninth Circuit Court to reconsider its Order denying their Petition for Rehearing. The basis of this Motion was a footnote 9 of the Opinion wherein the Court noted its inability to decide an issue due to an absence of evidence in the record:

We note that plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties. Whether the government may be held

responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide. [p.28a]

Christy's Affidavit in support of the Motion reflects his understanding that the bear he had shot may well have been transplanted to that area by government trappers. This possibility was affirmed by governmental officials. [See Affidavits of Richard P. Christy and of Sue Ann Love, p.35a and p.38a] The Ninth Circuit denied Petitioners' Motion to Reconsider without comment.

Petitioners seek a Writ of Certiorari based of their belief that the issues presented are of significant national importance since they affect not only Petitioners and their counterparts, but also the future of efforts to preserve threatened and endangered wildlife. Petitioners believe that the Ninth Circuit erred in its holdings on the Constitutional issues and in upholding summary judgment on the basis of Petitioners' failure to present evidence when that "failure" was solely due to the District Court's determination to stay discovery pending disposition of the Department's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

This case presents numerous issues previously undecided by this Court and in need of resolution. The federal government has acted by various legislation and treaties to protect wildlife. The method at issue in this case and its resulting effect is the Act's absolute prohibition on the killing of protected wildlife in the immediate defense of one's property and the failure of the Act to compensate for the property so taken. This has sparked a major conflict between the interests of government in preserving these species and farmers, ranchers and livestock owners. In states where grizzly bears are present or where this or other fearsome predators are likely to be reintroduced, flocks and herds are being and will continue to be depredated with alarming frequency and great economic

hardship to their owners. The three separate livestock owners in this case represent but a small percentage of those who have already been affected.⁴

A. The Existence Of A Constitutional Right To Protect Property Has Never Been Decided By This Court.

The resolution of this case requires as an initial step a determination of the existence and scope of a right under the Constitution of the United States to protect and defend one's property. When Petitioner Christy took aim and shot the grizzly attacking his flock he earnestly believed that he was exercising a right guaranteed him under the Constitution to protect his property from immediate destruction—a belief likely shared by most citizens. Yet, so far as is known, the question has never been decided by this or any other federal court.⁵

The absence of any express mention of the protection of property in the Constitution should not foreclose its existence among other rights protected. [See *Griswold v. Connecticut*, 381 U.S. 479 (1965) where this Court inferred a right to privacy despite the absence of express language in the Constitution.]

4. This controversy has increasingly been discussed in a wide range of periodicals. Excerpts from some of these periodicals appear at p. 62a - p. 75a.
5. This same conclusion was reached by the Tenth Circuit in *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir. 1985), on reh 799 F.2d 1423 (1986), cert. den. ____ U.S. ____, 94 L.Ed.2d 800 (1987), n.8 as follows:

The Endangered Species Act authorizes as an affirmative defense...that the defendant acted to protect himself or another person from bodily harm. 16 U.S.C. §1540(a) (3), (b) (3) (1982). No similar statutory defense exculpates actions to protect property. Several state courts have held that, as a matter of state constitutional law, a person may kill wildlife contrary to the state's conservation laws where such action is necessary to protect his property. See, e.g., *Cross v. State*, 370 P.2d 371 (Wyo. 1962). No case has yet addressed whether a similar right exists under the United States Constitution,....

Its existence among the other basic, natural human rights guaranteed by our Constitution is as old as the Magna Charta itself and is reflected in the famous discussion of fundamental rights under the privileges and immunities clause by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F Cas 546, 551-52, 4 Wash CC 371, F Cas No 3230 (Pa. 1823):

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole ... to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. (Emphasis added)

It is not surprising that the right to acquire, possess and protect one's property was listed in this discussion of some of the most basic, fundamental rights of all free people.

Several state supreme courts have expressly recognized such a right under their state Constitutions. *Cross v. State*, 370 P.2d 371 (Wyo. 1962); *Cook v. State*, 74 P.2d 199 (Wash. 1937); *State v. Rathbone*, 100 P.2d 90 (Mont. 1940). Most noteworthy of these cases is *Cross v. State* involving an interpretation of provisions of the Wyoming Constitution which are exactly like the federal Constitution in all pertinent particulars. The absence of any express mention of the right to

protect property Wyoming's Constitution was not determinative of the issue, as the Court said:

Our Constitution does not have the exact wording of the Constitution of Pennsylvania [which expressly provides for property] and so counsel claim that the right to protect property is not a constitutional right. . . . It is unbelievable that the inherent and inalienable right to protect property, as well as life and liberty, recognized long before the Declaration of Independence, was ignored or omitted from our Constitution or is nullified thereby. * * *

Id. at 376. (Emphasis supplied)

At present, both sides of this controversy operate with the assumption that their position is consistent with proper Constitutional construction. Petitioners and other stockgrowers emphatically believe that among the rights guaranteed by the Constitution is the right to protect their property from imminent destruction. The total absence of any provision for the right to protect one's property under any circumstances in the Act or regulations may reflect a Congressional view that no such right exists under our Constitution. *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468, *supra*. A decision by this Court would resolve this question to the benefit of property owners and protected species alike.

B. This Court Should Decide If The Right To Protect One's Property Is A Fundamental Right.

Assuming the protection of one's property is a Constitutional right, this Court would then determine whether or not it is to be considered a fundamental right. The opinion of the Ninth Circuit at p.6a reflects its belief this Court has admonished lower federal courts to refrain from expanding the rights denominated as fundamental:

The Supreme Court's teaching is clear and unmistakable—federal courts should refrain from divining new fundamental rights from the due process clauses of the fifth and fourteenth amendments,

at least when the claimed right is neither "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition." (citations omitted)

Petitioners will assert this right to protect property is "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition" and is therefore a fundamental right. Regardless of whether this position is ultimately adopted, it is of overriding importance that the question be resolved. Once this Court decides on the appropriate level of judicial review, it can then be used by the lower courts to determine whether a governmental abolition of that right violates Constitutional guarantees.

C. The Act And Regulations As Applied To Petitioners Thwart The Purposes of Preserving Endangered Predators.

The question of the existence of the right to protect one's property has arisen in the context of governmental protection of wildlife, where the interests of the government in preserving these species have conflicted with the individual's interest in either preserving and protecting his property and livelihood or being compensated for its loss. While the Act and regulations reflect commendable goals, they have created a most arbitrary and unjust situation totally contrary to the American concept of justice:

Stockgrowers are being placed in the unbelievable situation where they must literally stand by and helplessly watch—and only watch—while their valuable property is being destroyed by depredating animals. The resulting losses are uncompensated.

This places an unconscionable burden on the livestock owner and it has and will trigger results contrary to the very purposes for which the Act was designed. As public outrage over this injustice spreads, support and available habitat for grizzly

bears or other protected predators will diminish.⁶ The predictable result of this governmental scheme may well defeat efforts to expand governmental protection for indigenous predators and to reintroduce other predators absent from the continental United States.⁷ The wolf represents a case in point. The Wyoming Congressional delegation brought so much political pressure in opposition to a plan to reintroduce the wolf into areas of Yellowstone National Park, that the plan had to be scrapped by the Director of the Defendant Fish & Wildlife Service. The reason: Wyoming stockgrowers reasonably feared depredations to their livestock would occur against which they would be defenseless, and for which they would receive no compensation.⁸ Any statutory and administrative scheme which so frustrates the very goal it was designed to accomplish, and concomitantly deprives citizens of their Constitutional rights, fails to meet even the rational basis test.

6. Respondents themselves have acknowledged that public outrage has a detrimental effect on efforts to preserve certain species. The acknowledgement came by way of its justification for allowing the killing of gray wolves in Minnesota under certain conditions. See *Sierra Club v. Clark*, 735 F.2d 608, 618 (8th Cir., 1985) In its promulgation of the regulations it stated:

... It would allow the killing of any wolf caught within the one-half mile distance since farmer outrage over the release of a trapped wolf "cannot serve the cause of wolf conservation". * * *

7. The subject of reintroduction of certain predators, most notably the wolf, into the Continental United States, is discussed with frequency in current literature. Examples of portions of the texts of these articles appear at p.76a-p.88a. The literature also suggests that the unfairness and frustration caused by the present system encourages illegal killings of grizzly bears. p.88a

8. See excerpts from articles at p.76a-p.88a.

D. The Act And Regulations As Applied To Petitioners Violate Equal Protection Guarantees By Allowing Hunters to Kill Grizzly Bears For Sport While Depriving Petitioners Of This Authority Even In Defense Of Their Flocks.

The regulations promulgated pursuant to the Act create the following classification: they authorize a certain group of people to kill up to 25 grizzly bears for sport while withholding this same privilege from stockgrowers even when necessary for the immediate protection of their stock and livelihoods. [50 C.F.R. §17.40(b)(1)(c)] (The regulations specify the geographic area in which the 25 grizzly bears can be hunted and killed for sport. This is the same area in which Petitioners have sustained substantial losses of their stock to grizzly bears.) The Ninth Circuit opinion cited the Secretary's findings that a carefully controlled hunt would relieve grizzly bear population pressures and condition bears to avoid all areas where humans are encountered. [p.24a] If indeed the killing of 25 grizzly bears is necessary to avoid over-population problems and to eliminate unwary bears and bear-human and bear-livestock contacts, then the 25 bears should first consist of those committing significant depredations on livestock. In this manner, Petitioners could then exercise their right to protect property, while bears who would be most fearful of human contact would survive. Any statutory scheme which on the one hand allows hunters to kill grizzly bears for sport while withholding this same authority to stockgrowers who are about to lose their property and livelihood (and then fines them if they do kill a depredating grizzly bear) cannot bear any relationship to the governmental purpose of preserving the species.

E. The Controversy And Far Reaching Effects Created By The Present Statutory Scheme Require This Court's Resolution Of The Taking Issue In The Context Of Protected Wildlife.

Though several state and lower federal courts have decided the issue of whether or not damage to private property from

protected wildlife constitutes a taking, the question has never been ruled upon by this Court. The federal government operating from its obvious assumption that destruction of property by protected wildlife does not constitute a taking has imposed very extreme hardships upon stockgrowers in its efforts to preserve threatened and endangered predators.

The government's action has caused great controversy and outrage among stockgrowers and other members of the public who steadfastly believe that the ongoing destruction of their sheep by governmentally-protected grizzly bears is a taking in the classic sense. Until a decision is reached by this Court as to the Constitutionality of the current regulatory scheme, the controversy will only escalate and its detrimental effects be prolonged.

In the case of *Armstrong v. U.S.*, 36 U.S. 40, 49 (1960), this Court described the purpose of the Fifth Amendment just compensation provision:

It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar governments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as whole."

The statutory and regulatory scheme at issue here imposes on Petitioners the very situation which the "just compensation" provision was intended to prevent. Preserving endangered species will ostensibly benefit the entire nation. However, it is the stockgrowers operating in or near grizzly habitat who alone are forced to bear the heavy burden of conserving this species. Frequently this occurs, as it did in this case with respect to Petitioner Christy, when grizzlies are introduced by the government into an area not previously inhabited by them.

As a part of its decision on the taking issue, the Ninth Circuit ruled while the grizzly bears were and are physically taking sheep, their actions were not attributable to the government. This conclusion is erroneous. The intolerable situation imposed on Petitioners is exclusively the result of extensive governmental control which requires stockgrowers to literally stand by and watch their stock being destroyed and

thereafter provides no compensation. It is a fiction to say that the grizzlies are not, as a result of that action, rendered instrumentalities of the government. Petitioners will argue it is the combination of the absolute prohibition on protecting property and the refusal to compensate for losses which effects a taking.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted this 22nd day of February, 1989

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